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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., ET AL.,
Petitioners,

VERSUS

UNITED STATES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES

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September, 1961.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

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STATEMENT OF THE CASE

In each of these actions third-party complaints were filed by respondent United States of America against American Airlines upon asserted rights to full indemnity (R. 11-13). If the allegations of the Government against American be established, then the ultimate payment of any judgment rendered herein must be made by American.[1]

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[1] Respondent American Airlines appears before this Court in support of the judgment rendered favorably to respondent United States of America.

Respondent American adopts the narrative statement of the case as made by petitioners in their brief.

STATEMENT OF THE ISSUES

I.

Negligence of the Government is alleged to have occurred within the State of Oklahoma, resulting in deaths of petitioners' decedents in the State of Missouri. Under these circumstances should the liability of the Government be determinable by application of the law of the state where the deaths occurred,[2] or should the law of the state within which the negligence occurred be applied?[3]

II.

If under these circumstances it be deemed that the liability of the Government is determinable solely by application of the law of the state wherein the negligence occurred, should the Government's liability be determinable by the application of the entire law of that state, including its rule of conflicts of law;[4] or should this liability be determinable solely by reference to the statutory law of that state?[5]

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[2] *United States* v. *Marshall*, 230 F.2d 183 (C.C.A. 9th).

[3] *Eastern Airlines* v. *Union Trust Company*, 221 F.2d 62 (App. D.C.). *Certiorari denied sub nom. Union Trust Company* v. *United States*, 350 U.S. 911.

[4] *Richards* v. *United States*, 285 F.2d 524 (C.C.A. 10th).

[5] This was the result reached in the *Eastern Airlines* case, although no explanation or reason is given for the result *since no majority opinion*

SUMMARY OF ARGUMENT

The *choice of law* indicated by the language of the Federal Tort Claims Act is *the selection of local or state law*, in rejection of a new system of uniform, federal laws. The Act is silent with regard to *a choice of a rule of conflicts of law*, a fact strongly persuasive of a Congressional intent to remove the Government's cloak of immunity to tort claim and suit without modification of existing rules of conflicts of law.

Because the Act expressly provides that the Government shall be liable "in the same manner and to the same extent as a private individual under like circumstances,"[6] existing rules of conflicts of law require, in the circumstances of this case, the characterization of the Government's liability by the substantive law of the state wherein *the actionable negligence* existed.

To extract from the remainder of the provisions of the Act the singular expression "the law of the place

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[5] (Continued)

respecting this issue was filed. Judge Miller dissented, in part stating (at page 80):

> "I do not agree that the language of § 1346(b) *compels us to conclude* that Congress had in mind the general conflicts rule to which reference has been made and intended to make it inapplicable in situations such as this. I think the legislative expression 'in accordance with the law of the place where the act or omission occurred' *was intended to mean, and therefore should be construed as meaning* 'in accordance with the law of the place where the tort occurred.' An act, in legal as well as in popular use, is not merely a voluntary muscular contraction, but something more. The word commonly includes the consequent result of the muscular contraction. If the defendant pulls the trigger and the bullet kills a man, in legal as in popular usage, the killing is said to be the defendant's act." (Emphasis supplied.)

[6] Federal Tort Claims Act, 28 U.S.C., Section 2674.

where the act or omission occurred,"[7] as constituting a Congressional mandate for a drastic, bizarre alteration to existing concepts of conflicts of law, is not justified in the absence of a clear expression of Congressional intent to so provide. No implication of such intention is found in the Congressional hearings. No useful purpose or reason for a different rule exists in favor of the courts, the public, or the Government. Only widespread confusion can result from the adoption of such a construction of the Act.

In these actions the petitioners had a right of action against the Government under the law of the State of Missouri.[8] They have been paid for that alleged liability.[9] The actions were properly dismissed.

ARGUMENT

I.

By the provisions of the Federal Tort Claims Act the liability of the United States is determinable by application of the substantive law of the place wherein the actionable damage, injury, or death occurred.

The Federal Tort Claims Act contains several references to "the law of the place where the act or omission occurred." From the use of this expression it is evident that the Act may have been effected to designate a particular *choice of law*. Is it necessary and reasonable to conclude that this choice was an election between "the

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[7] Federal Tort Claims Act, 28 U.S.C., Section 1346(b).

[8] Wrongful Death Act of the State of Missouri, Title 36, V.A. Mo. S., Section 537.080.

[9] (R. 20-22).

law of the place where the act or omission occurred," within that expression's narrow, literal meaning, to be distinguished and differentiated from the law of the place where the damage, injury, or death occurred?

No provision of the Act rejects or excepts from the Act application of existing rules of conflicts of law to the liability of the Government under the provisions of local or state law.

The Act is not silent in this regard. There is no vacuum or ambiguity of Congressional requirement. To the contrary, it is expressly provided that the Government shall be liable "in the same manner and to the same extent as a private individual under like circumstances,"[10] excepting only a group of specific, delineated modifications to this ambit of liability. The list of exceptions contains no direct or indirect modification to existing principles of conflicts of law. They apply to the conduct of the Government "in the same manner and to the same extent" as to any private individual similarly situated.

From a reading of the Act in its entirety, without a narrow interpretation of scattered clauses of the Act to the exclusion of the remaining language, it is apparent that the Act adopts a standard of liability for the Government for certain negligent conduct of its employees. This negligence of "act or omission" is not reasonably to be deemed negligence in the abstract, or conduct without consequence; *it is implicit that the negligence be actionable.*

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[10] Section 2674.

From the legislative history of the Act,[11] it is apparent that the inclusion of the language "law of the place of the act or omission" serves a distinctly different purpose than the selection of a new concept of conflicts of law. Its purpose was to punctuate a Congressional intention to ascribe the Government's liability to existing local or state law, and to unequivocally reject any notion of an intent to provide a new system of federal tort liability.[12]

It is only when one attempts to inject novel meaning into the language of the Act that any ambiguity is found. This is a process of isolating particular phrases of the language to the exclusion of the readily apparent purpose of the Act as read in its entirety. Fairly construed, the intent and meaning of *the choice of applicable law* is clear and concise.[13]

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[11] *Dalehite* v. *United States*, 346 U.S. 15, 24-30; *Feres* v. *United States*, 340 U.S. 135, 139-140; Hearings before the Committee on the Judiciary, House of Representatives, Seventy-Seventh Congress, Second Session, on H.R. 5373 and H.R. 6463.

[12] "It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." *Feres*, at page 141.

[13] Testimony before the House Committee on the Judiciary, Hearings, etc., in part reads (at page 30):

"Mr. Shea: • • • Under the other bill it was not specifically provided that local law should govern, and certain express provisions were made, for instance, as to distributions.

Mr. Celler: Do you need that? Is that necessary to express it?

Mr. Shea: *I should think the earlier bill would probably be construed as applying the local tort law, but this bill specifically covers it,* leaving the distribution in cases of death, etc., to the local law.

Mr. Celler: The only trouble is in future bills you may have to put that precedent in. If you leave it out the courts may not construe it should apply. I am only thinking out loud to get your reaction.

Mr. Shea: *This bill provides explicitly for the application of local law.*" (Emphasis supplied.)

In their brief petitioners cite segments of some of the testimony before the House Committee on the Judiciary,[14] testimony which, they argue, "reinforces" their interpretation of the meaning of the Act. They do take note of an indiscriminate variance in choice of language by the chief witness, the Honorable Francis M. Shea, then Assistant Attorney General of the United States. This testimony is here repeated solely for emphasis:

"Mr. Robsion: Where does claimant bring the suit?

Mr. Shea: The suit is to be brought in the district courts in the several districts.

Mr. Robsion: Where the claimant resides?

Mr. Shea: *Either where the claimant resides, or in the local[ity] of the injury or damage.*"[15] (Emphasis supplied.)

While petitioners argue that this testimony should be construed in the light of the question being addressed to a problem of venue, and not to a choice of law problem, that is fallacious reasoning.[16] The venue section of the Act is identical in this regard to the provisions waiving the immunity of the Government; this section provides that an action may be prosecuted "where the plaintiff resides or wherein the act or omission complained of occurred."[17]

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[14] Hearings, etc., *supra*.

[15] Hearings, etc., at page 9.

[16] This evidently was Judge Miller's conclusion in registering his dissent to the decision in the *Eastern Airlines* case; and ~~so~~ *one can determine the basis of the majority holding therein* because no majority opinion was filed upon this issue.

[17] Section 1402(b).

Does this indiscriminate inter-change of language signify a designed term of art; or does not this inter-play of words merely signify a lack of purpose or design to effect any modification to existing local or state rules of conflicts of law?

Petitioners say that the Assistant Attorney General was not addressing these particular remarks to a choice of law problem. While this is true, it is certainly pertinent to inquire exactly where in the legislative history of the Act is found any remark addressed to a problem of choice of rules of conflicts of law.[18] One may study this testimony in its entirety, read the remarks of Committee membership, and examine the complete legislative history leading to the adoption of the Act, without discovering any discussion, reference, or mention of a recognition of a conflicts of law problem or question. This should not be presumed to be mere oversight. Why should the Committee have considered a non-existent question? No attempt was being made to modify existing rules of conflicts of law; and, without such a drastic innovation, why should any new problem in that regard reasonably have been anticipated?

To the contrary, a study of the Congressional hearings, viewed in conjunction with the legislative history leading to the adoption of the Act, clearly indicates a Congressional intention not to modify the law applicable to the tort liability of the Government from that of a private indi-

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[18] Petitioners apparently do not recognize and distinguish the difference between a "*choice of law* problem" and a question of *choice of rules of conflicts of law*.

vidual under similar circumstances. The Government's tort liability, like that of a private individual, would exist by reason of the applicable law of the locale or state where the tort was committed or occurred—where the damage, injury, or death occurred—where actionable negligence occurred. Further testimony by the Honorable Francis M. Shea reads, in part:

> "Mr. Shea: * * * Claims arising in a foreign country have been exempted from this bill, H.B. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims *arising in this country*. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.
>
> Mr. Robsion: You mean by that any representative of the United States *who committed a tort in England* or some other country could not be reached under this?
>
> Mr. Shea: *That is right*. That would have to come to the Committees on Claims in the Congress."[19] (Emphasis supplied.)

When does a tort or claim "arise?" When is an act or omission "wrongful?" When there is a resultant damage, injury, or death—when such act or omission is actionable. These conclusions are implicit in the wording of the question by the Committee (*i.e.*, "any representative * * * who committed a tort in England") and the response of the Assistant Attorney General.

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[19] Hearings, etc., at page 35.

The irony of petitioners' contentions rests in their inconsistency. They ask this Court to adopt conflicting, contradictory rules of construction in interpreting segments of a singular phrase of the Act. Construction is requested of the phrase "law of the place where the act or omission occurred." On the one hand they argue that the term "law of the place" should be broadly interpreted to mean "only statutory[20] law, without regard to rules of conflicts of law;" on the other hand they urge a strict interpretation of the meaning of the remaining language "where the act or omission occurred," without reference to the context of that language in the Act.

That argument is self-defeating. Fairly construed, when viewed in context with the purpose and function of the Act, as fully disclosed in its legislative history, the use of the unqualified term "law of the place" is a clear and concise *reference to all law existing in the locale or state*, whether founded upon ordinance, regulation, statute, decision, constitutional provision, or the common law. It necessarily includes a reference to the rules of conflicts of law recognized under the "law of the place." When construed in that manner, the meaning of the remaining language of the phrase "where the act or omission occurred" is obvious and requires no complex interpretation. There is a technical distinction, without a cognizable difference, between a determination of liability by the substantive law of the place of the tort, as contrasted to the law of the place of the act or omission resulting in the

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[20] Petitioners seek recovery of damages "under the Oklahoma Wrongful Death Statute." (R. 5; Petitioners' Brief, at page 6.)

tort, including its rules of conflicts of law which automatically refer the determination of liability to the substantive law of the place of the tort. *Under either interpretation the Government's liability is determinable by application of the substantive law of the place of the damage, injury, or death.*

The particular construction of the Act being urged by petitioners would result in endless confusion to all concerned with a multi-state tort caused by negligence of the Government. While in the circumstances of this case the Government's negligence is alleged to have occurred only within the State of Oklahoma, it is common knowledge that a significant percentage of torts committed in this day result from the combined, concerted negligence of two or more joint tort-feasors. This Court will take judicial notice that the Government has two or more individuals in its current employ. If, therefore, party A be injured, damaged, or killed in State W as a direct consequence of the conjoint negligence of Government employees variously situated in States X, Y and Z—and assume further that each of the four states has significantly different provisions of substantive law otherwise applicable to the remedy of A—the law of which of the four states should be applied by the district courts under the Act by the interpretation urged by the petitioners? Patently there is no logical solution because that would be a result wholly unintended by the framers of this legislation; no procedure was expressly or impliedly provided in the Act for the handling of such a situation. By a proper construction of the Act, with no modification to existing rules of conflicts of law, the law of State W would be uniformly applicable to the Government's liability.

No useful purpose or reason exists for acceptance of petitioners' interpretation of the Act. Contrary to their argument, such a construction does not constitute a further limitation upon the liability of the Government, nor would it uniformly create any benefit to persons seeking redress against the Government. It would, on the other hand, create many additional problems for the district courts in their endeavors to attain a uniform application of the Act in Tort Claims litigation.

The decision of the Circuit Court in this case was in conformity with the views expressed herein. The Court first held that there is no statutory law of the State of Oklahoma giving rise to a right of action against the Government under the circumstances of the case. Judge Bratton recognized (at page 525 of the opinion) that the Wrongful Death Act of Oklahoma[21] "is limited in effect to wrongful deaths which occur in Oklahoma."

With the necessary realization that this was a result obviously unintended by Congress in its adoption of the Act, the Court then determined if a right of action existed under the law of Oklahoma when viewed in its entirety, including its applicable rules of conflicts of law. In this respect the Court found that petitioners' remedy, by application of the Oklahoma rule of conflicts of law,[22] had

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[21] Wrongful Death Act of the State of Oklahoma, Title 12, Okla. Stat., Section 1051, *et seq.*

[22] "Where an act of omission or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place." Page 523 of the opinion.

existed by virtue of the substantive law of the State of Missouri, the law of the place of the deaths. For the majority Judge Bratton observed (at page 525 of the opinion) that: "A transitory action for wrongful death occurring in another state may be maintained in the courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy."

The Circuit Court then concluded that such causes of action had become extinguished by reason of petitioners' previous full satisfaction under the Wrongful Death Act of the State of Missouri.[23]

CONCLUSION

The Circuit Court correctly recognized and held that in the circumstances of this case the law to be applied under the Federal Tort Claims Act, in determining the alleged liability of the United States of America, is the law of the state where the deaths occurred, the law of the State of Missouri. The petitioners having already received full recovery under the law of the State of Missouri, the actions were properly dismissed.

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[23] Petitioners should not be heard to plead any hardship. They have never denied having had a cause of action against the Government under the substantive law of the State of Missouri; *nor can they deny having received a full recovery of damages under that law.*

The judgment of the Circuit Court should be affirmed, for which prayer is made.

Respectfully submitted,

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